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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 864

ALLAN C. CAIN and MARGARET S. CAIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Allan C. Cain and Margaret S. Cain, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment and sentence of the United States Court of Appeals for the Seventh Circuit are appended to the petition and appear in the certified record. The original opinion issued January 25, 1962, and an order amending the opinion accompanied the denial of the petition for rehearing, which order of denial was issued on March 12, 1962. The Clerk of the Court of Appeals below reprinted the opinion, containing the amendments and marked it "CORRECTED COPY". A "Corrected Copy" of the opinion also appears in the certified record, and in the Appendix hereto.

The corrected opinion has been reported as set forth in the Appendix hereto, as 298 F. 2d 934.

JURISDICTION.

On March 12, 1962, the original opinion was modified by an order of amendment accompanying an order denying the petition for rehearing. (These orders appear in the Appendix). This petition is filed within 30 days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) 62 Stat. 928.

QUESTIONS PRESENTED.

1. Do the so-called rules in the M'Naghten case, described in *Davis* v. *United States*, 160 U.S. 469, remain as the exclusive test to be applied to the insanity defense in criminal cases in the District Courts of the United States, in the light of advances in medical and psychiatric science and the diagnosis and treatment of mental diseases and defects, and in the light of new

tests adopted or suggested by Courts of Appeal for various Circuits, to-wit, the District of Columbia, and the Third, Fourth, Eighth, and Ninth Circuits? Has the time arrived when progress in medical and psychiatric science and the diagnosis of mental diseases and defects and their causal results makes it appropriate and necessary for this Court to appraise and definitively resolve conflicts involving the so-called rules in the *M'Naghten* case, as compared with the so-called Durham Rule, the Model Penal Code, and the views of the Third, Fourth and Eighth Circuits concerning appropriate tests for the insanity defense, and the gradation of responsibility for crime?

Does progress in this field since 1946 show that "experience has clearly demonstrated the fallacy or unwisdom of the old rule" as suggested by *Fisher* v. *United States*, 328 U.S. 463, 476 (decided June 10, 1946)?

2. Where in a trial without a jury, a trial Court states the tests of mental competency to commit a crime are,

> "If a person can distinguish between right and wrong, *or* if he is aware of what he is doing and has the mental capacity to choose between a right and a wrong course of action, it is my view that the law requires that he be held responsible for his acts." (Emphasis supplied).

and it cannot be determined, which of the alternative tests was relied upon by the trial Judge for decision, did not the Court of Appeals below err in a matter important to the administration of criminal justice when it approved the erroneous test, and failed to reverse the judgments and sentences of the District Court?

Is any test for the insanity defense which omits the element of ability to control one's actions or conform his conduct to law, sufficient?

3. Does the appearance of apparently intelligent practice of law, according to the ordinary and casual observation of lawyer opponents and two Judges, remove all reasonable doubt of insanity, organic brain disease, mental defect, and mental incompetence to intentionally commit the crime charged, as established by the testimony of a trained psychiatrist, an attending doctor, and three eminent and highly qualified medical doctors who specialize in diagnosis and treatment of brain and mental disease and defect?

4. Where the evidence does not conform to or sustain the indictment against a wife on the charge that she and her husband wilfully attempted to evade and defeat "their tax" upon "their income" by reason of a complete and admitted non-existence of any income or proof of tax liability on the part of the wife, did not the Court of Appeals below err in failing to reverse her sentence to imprisonment by the District Court on the ground of substantial variance between the indictment and the proof?

5. Where evidence relied upon to sustain conviction does not conform to or sustain the charge in the indictment, has not the indictment been amended to conform to proof, and has not the defendant been deprived of the right to be informed of the nature and cause of his accusation and the right to avoid future jeopardy, and the right to be charged and indicted for felony only by a grand jury?

Is there not a crucial question in the case at bar as to whether petitioner Margaret S. Cain was convicted of an offense not charged in the indictment?

(*Stirone* v. *United States*, 361 U.S. 212)

6. Was the specific intent to evade and defeat taxes, as required by the statute which prescribes wilfullness as an element of the offense, established, where the evidence shows that the petitioners, husband and wife, suffered substantial emotional disturbance by reason of the husband's malignant tumor on the left side of his face which steadily grew worse in the several years prior to the period involved in the indictment, and was aggravated by X-Ray treatment; and where there were substantial family tragedies including the death from unexplained disease of the husband's sister, and the suicide of the sister's husband from apparent grief; and thereafter progressive growth of the malignancy of the husband, culminated in an operation at Mayo Clinic for the removal of the tumor with subsequent plastic surgery, and a subsequent recurrence of the malignancy which ultimately required an operation; all concurrent with a condition diagnosed by medical and psychiatric experts as a physical atrophy of the left front lobe of the brain in substantial and recognizable quantity and degree, visual by X-Ray; and where upon a routine investigation by a Revenue Agent of a deficiency, the petitioners voluntarily disclosed a fear that they had a substantial tax deficiency, and thereafter cooperated fully in the determination of such deficiency by furnishing books and records, and requested explanations, and there are not present any of the usual badges of fraud, and the husband pays the deficiency asserted in the indictment as soon as he is informed of the determined amount?

STATEMENT OF THE CASE.

The petitioners are husband and wife. The husband practiced law in Wisconsin, and the wife worked as his secretary without salary. Allan C. Cain's law office was at Kaukauna, Wisconsin.

The petitioners were convicted on four counts charging willful and knowing attempt to evade and defeat their income taxes due for the years 1953, 1954, 1955, and 1956. The indictment was returned on January 18, 1960, and the first count is based upon Section 145(b) of the Internal Revenue Code of 1939; and the second, third, and fourth counts are based upon Section 7201 of the Internal Revenue Code of 1954.

Prior to trial, a motion to suppress evidence on the ground that the cooperation and information secured from the defendants was fraudulently obtained by criminal investigators under the guise of conducting a civil investigation of tax liability, was denied.

The petitioners waived trial by jury and the case was tried in the United States District Court for Wisconsin at Milwaukee, by Judge Luther M. Swygert then District Judge of the Northern District of Indiana, without a jury. Judge Swygert now a Judge of the Court of Appeals, was assigned to the District of Wisconsin for this trial by the Chief Judge of the Seventh Circuit Court of Appeals.

The trial commenced on March 20, 1961, with a finding of guilty as to both defendants. On May 4, 1961, both the petitioner, Allan C. Cain, and his wife, petitioner Margaret S. Cain, were sentenced to one year imprison-

ment on each count, the sentences to run concurrently, and each defendant was sentenced to the payment of a fine in the sum of $2000.00 and court costs. Thus, each defendant is subject to one year imprisonment and the payment of a fine of $2000.00 and court costs.

The trial Judge denied bail pending appeal, but on application to the Court of Appeals bail, pending appeal, was fixed at the sum of $1,000.00 for each petitioner, which bail was furnished and approved.

PLEADINGS, ISSUES AND PROOF.

The indictment stated that the defendants, who are husband and wife, filed false and fraudulent joint income tax returns. The charges in the respective counts for the respective years are as follows:

Count	Year	Income Reported	Income Charged	Alleged Tax Deficiency
I	1953	$5,720.17	$29,168.41	$8,880.88
II	1954	8,243.53	30,075.59	7,461.97
III	1955	6,784.16	14,624.09	1,998.72
IV	1956	7,926.95	15,481.49	2,004.53

Substantial discovery was had before trial and the authenticity of many documents was stipulated to by counsel for the parties, thus reducing the trial time substantially.

The motion to suppress was based upon the fact that the government agents secured a substantial amount of papers, documents, and information from the defendants under the guise of a commonplace routine inspection of tax liability, and on the ground that the defendants were misled into delivering a substantial amount of evidence described in the motion to suppress. (A. 9-14).

The proof in this case was by the net worth method and it is contended that the opening figures are not only inaccurate and speculative, but were adopted by the agents from the materials sought to be suppressed without sufficient establishment of the validity of said figures and without proof that appropriate leads to extrinsic independent evidence had been exhausted. Thus, under the proof it was contended the government's case depended, for substance, on evidence secured from the defendants, and not adequately corroborated.

The Court of Appeals below held as follows (P. 1 and 2 of the Op.):

> "Allan Cain is a Wisconsin lawyer. He and Margaret S. Cain were married in 1934 and she has, since that time, been his full time secretary. In 1957 Government agents began an investigation of a $750.00 deduction in the Cain 1955 joint tax return. At a conference with the Cains the agents were told by Cain that he had underestimated income for several years and had $20,000.00 for payment of any deficiencies. The agents with help from the Cains eventually corrected the gross income, net taxable income and tax liability for the years 1953 through 1956. The total deficiency was $19,946.10, which the Cains paid the Government January 15, 1960."

There was no contest concerning the fact of Petitioner Allan C. Cain's tax deficiency, but there was objection to the government's computation of his liability as being based upon an unestablished beginning net worth which consisted of a computation by the agents, presented to the defendants, rather than emanating from them or their knowledge. (A. 84-86).

The petitioners further objected, by their motion to suppress, to the use, in computation for criminal purposes, of the material obtained by the agents from the petitioners

on representation that the investigation was a routine civil matter. (A. 55, 57, 9). Figures were suggested to the defendants, but were not verified by them, because of insufficient knowledge and mental ability to judge their correctness. (A. 85). The suggested figures of the agents were, however, apparently "accepted" or not debated by Mr. Cain, or, for that matter, by Mrs. Cain. (A. 105).

On the issue of wilfulness and intent, the case is unique because of the voluntary disclosure and assistance of the petitioners in attempts to determine their correct tax liability. Also of significance, on this issue, is the testimony of two government agents who investigated the matter after Mr. Cain disclosed to Revenue Agent Boldt that he probably owed a substantial deficiency. (A. 14).

Revenue Agent Boldt admitted that the Cains did have records which would enable an accountant to file a correct return if properly utilized with appropriate explanation, and that the Cains did furnish the explanations to him and Mr. Sanderson and cooperated in every way. (A. 60).

Revenue Agent Boldt admitted that he had picked up all the Cains' records on September 18, 1957 and returned them on June 18, 1959. (A. 61).

Revenue Agent Boldt stated that the Cains did not have anything like a double set of books and that there were no false records or false entries apparent, and that there was no evidence of any false invoices or documents or evidence of the destruction of books and records. (A. 61). Revenue Agent Boldt admitted that Mr. Cain made all files available and that there were no assets concealed, and that neither Mr. or Mrs. Cain ever attempted to cover up any source of income.

Revenue Agent Boldt further testified that during the course of the investigation there was no conduct on the part of the Cains, the likely effect of which would be to mislead or conceal.

Special Agent of the Intelligence Unit Sanderson stated that he found no evidence of a double set of books, or of false entries or alterations, false invoices or documents or of destruction of books or records. (A. 89).

He further found no evidence of concealment of assets or of cover up of sources of income, and stated that there was no conduct, the likely effect of which would be to mislead or conceal, and he knew of no instance where either defendant attempted to get in touch with prospective witnesses.

On the issue of Mrs. Cain's guilt in addition to the lack of evidence of wilfulness as indicated above, the evidence showed that she had no income whatsoever during the years in question, and there was no proof of any tax liability on her part.

Special Agent Schwalbach (A. 108) testified for the prosecution, as an expert, to his opinion of the tax liability from all of the evidence. As to each year his questioning, in substance, was as follows:

> "By Mr. Corry:
>
> "Q. Now, assuming that *a resident* of Wisconsin who, during the calendar year of 1953 was married, and who filed a joint return with his wife and who was entitled to two exemptions, had a net income of $29,168.41, can you tell what would be *his* correct income tax liability for that year? (Emphasis supplied).
>
> "A. Yes, sir.
>
> "Q. And what would it be?
>
> "A. The correct income tax liability would be $9,496.84.

"Q. Assuming further that *such person* reported a net income of $5,702.17, upon which he paid an income tax of $1,015.96, what would such *a taxpayer* still owe the United States Government? (Emphasis supplied).

"A. *He* would still owe $8,480.88." (Emphasis supplied).

The witness Schwalbach was asked the same questions for the succeeding years of 1954, 1955 and 1956, and gave the claimed deficiency of *the* taxpayer (Allan C. Cain) for each of these respective years. (A. 117).

The indictment in the case at bar (A. 5-8) charges willful and knowing attempts to evade and defeat tax due and owing by *them* and charges that *their* joint net income was in a sum in excess of *their* net income for each of the years in the respective counts of the indictment. It was contended that since the petitioner, Margaret S. Cain, had no income and no tax liability according to the proof, there was thus a substantial and fatal variance between the indictment and the proof against Margaret S. Cain. The Court of Appeals stated that it considered the trial Court had only considered proper evidence against Margaret S. Cain (Op. 5). The Court of Appeals, however, failed to consider or pass upon the variance between the charge and the proof, or to give any consideration to Margaret S. Cain's susceptibility to further prosecution on a charge conforming to the proof.

It was further contended that Congress did not intend to create a vehicle for prosecution of wives with no income by granting a tax relief to a married taxpayer because of his status as a householder or head of a family.

The issue which has been of paramount importance insofar as the petitioner, Allan C. Cain, is concerned, was raised by the presentation of medical and psychiatric doc-

tors who gave evidence that the acts charged against the petitioner, Cain, were the result of organic brain disease and defect, and that this petitioner, because of his brain disease and defect could not exercise the judgment necessary to form the intent to file a false income tax return. Also presented in this insanity defense issue was the report of doctors at Mayo Clinic at Rochester, Minnesota, where Mr. Cain was operated in early 1954 for cancer on the left side of his face, subsequent to unsuccessful treatment by use of X-ray. In 1959, he was operated for recurrence of the affliction on his ear.

These doctors included Dr. Daniel W. Curtin, (A. 118), a neighbor and a physician who had attended Cain on occasion; Dr. Harry T. Maxwell (A. 122), of Milwaukee, Wisconsin, who testified that he was a specialist in nervous and mental diseases, certified by examination by the American Board of Neurological Surgery; Dr. Francis J. Millen, (A. 155), a neurologist with a sub-specialty in electroencephalography; Dr. James Hurley, (A. 175), who testified to a broad experience since 1938 in neuropsychiatry. The petitioner further introduced the testimony of Leo F. Graham (A. 139), who is a clinical psychologist with a Master's degree in psychology from St. Louis University and 2½ years additional training at the University of Texas.

The evidence of the doctors concerning the organic brain defect and mental disease of the petitioner and its resulting effect upon his judgment and ability to form intent was uncontradicted.

To meet the issue created by this evidence, the government introduced testimony of a dozen lawyers and two State Court Judges, who testified concerning their experiences with Cain in the practice of law and the trial of

cases. These witnesses were not asked concerning any knowledge of the petitioner's organic brain defect, or even concerning the objective evidence of the cancer lesion on the petitioner's face prior to his operation and the scar tissue resulting from the operation, or other physical evidences of his illness.

The medical testimony on behalf of the petitioner appears at Pages 118 to 193 of appellant's Appendix in the Court of Appeals, which has been certified to this Court. The responding testimony on this issue on behalf of the government appears at Pages 235 to 243.

Doctor Curtin testified that he has been a practicing physician and surgeon at Kimberly, Wisconsin, about three miles from Kaukauna, Wisconsin, since 1930, and was acquainted with the petitioner, Allan Cain for about 25 years. Dr. Curtin testified to the history and affect of the cancer lesion on Cain's face from 1947. The doctor testified to several tragic deaths in Cain's family, and to radical changes in Cain's conduct which caused the doctor to say of Cain, "I think the guy is nuts the things he is doing." On cross-examination Dr. Curtin stated he was a general practitioner and not a psychiatrist and that he would say that Allan Cain suffered "from confusion, frustration, grief, worry and fear." (A. 118-121).

Leo F. Graham testified that he was a clinical psychologist, formerly on the faculty of Marquette University, a member of professional associations, and stated that he had published papers in psychological journals. Mr. Graham testified that he had administered various psychological tests, and stated his opinions that suffering from a combination of psychogenic problems and organic brain defect and disturbance had reduced Cain's functions very much. (A. 139-146).

Doctor Maxwell (A. 122), Dr. Millen (A. 155), and Dr. Hurley (A. 175), recited substantial experience, studies, and professional recognition which supported their qualification as experts in the diagnosis and treatment of mental defects and diseases. The doctors stated that, in their opinion, the petitioner's organic brain disease began sometime between 1948 and 1952. All were definite that there was an identifiable organic brain disease and that it had resolved in physical atrophy of the left front lobe of the brain with a resulting loss of brain function in forming finely integrated judgment and in reasoning. Each stated that the petitioner did not have the mental ability to form the intent to file a false income tax return.

The Court of Appeals summarized the defense testimony on this issue as follows:

> "Defense testimony on the metal incompetency issue was substantially this: Allan Cain during 1953 through 1956 was not competent to form a criminal intent in filing income tax returns. He had then an organic brain disease complicated by emotional stress due to family tragedy and fear that he was doomed by cancer. He suffered from 'confusion, grief, worry and fear' and was incapable of dealing with severe emotional and psychological stresses. He knew the difference between right and wrong in some areas but not in others, and was incompetent in matters of 'judgment, finely integrated thought patterns and memory concentration * * *.' It was doubtful whether he could determine right from wrong in income tax matters. He might be conscious of wrongdoing but have no choice. He could perform only the mechanical parts of law practice and his ability to handle defense of a murder case was doubtful.
>
> "Also: There are many gradations of emotional and mental abnormalities. The inability to go beyond mechanical parts of law practice was a 'gradation

problem.' Generally, incapacity to determine right from wrong in income tax matters would be observable by others." (CORRECTED OPINION P. 3, 4).

The Court of Appeals said of the Government's testimony on the issue:

> "The Government testimony, of the judges and lawyers, was to the effect that Cain handled himself very well between the years 1954 and 1960; showed 'sharp judgment and thought' in cross-examination; was 'very definitely' capable of computing special damages in injury cases; 'courtroom pressure' did not affect him; and was capable of handling himself in any situation. There was testimony that he defended murder and other criminal cases." (CORRECTED OPINION P. 4).

It is respectfully suggested that to detail the testimony on this issue would unduly lengthen the petition and reference is made again to pages 118-193 and 235-243 of the appellants' Appendix for the evidence of both parties on this issue.

The Court of Appeals below described the trial Court's test for application to the testimony on the insanity issue as follows:

> "The trial court's test was:
>
> > "If a person can distinguish between right and wrong, or if he is aware of what he is doing and has the mental capacity to choose between a right and a wrong course of action, it is my view that the law requires that he be held responsible for his acts.'
>
> "The first alternative of the 'test' is incomplete. We think, however, the second alternative, which alone the trial court applied in deciding Cain's capability for wilfulness, is substantially that provided in the

Illinois Code, which defendants suggest is a 'significant advance' and the proper test." (CORRECTED OPINION P. 2-3).

The Court of Appeals then stated:

"We find no error in the test applied—".

The petitioner contends that the test claimed as applied is not sufficiently comprehensive in the light of scientific advances, and adherence to it caused a disregard for the petitioner's scientific evidence of demonstrable physical atrophy of the petitioner's brain, and his mental disease, which resulted in inability to exercise judgment necessary to form the intent requisite for the violations charged, or to conform conduct to the requirement of law.

REASONS FOR GRANTING THE WRIT.

This Court should grant the writ of certiorari sought by this petitioner because it presents important questions of Federal criminal law which have not been, but should be settled by this Court. These questions involve the law and tests applicable to the defense of insanity in criminal cases in District Courts throughout the United States. Involved are conflicts in the decisions of several circuits.

Elements of the problem requiring definitive determination by this Court are:

1. In the light of progress and modern advances in the diagnosis and treatment of brain defects and disease and related causation of crime, what are the proper standards for determination by Courts of mental competency and responsibility for criminal acts, where the defense of insanity is raised?

2. When is the quantity and quality of proof or evidence sufficient to raise the question of sanity of the defendant; and what is the quantity and quality of proof required of the prosecution to prove sanity beyond a reasonable doubt once the question of insanity has been sufficiently raised?

It is submitted that currently there is substantial disagreement and confusion over the definitive tests and standards for determination of criminal responsibility where the defense of insanity is raised. While it is recognized that some of the differences between Courts of Appeals for various Circuits, as well as State legislatures and proponents of the Model Penal Code, lie in semantics, there are, in some cases, substantial differences in announced and defined standards. It is submitted that the confusion and doubts in the Federal Courts, recognized by the Courts of Appeals and the District Courts as now existing, should be removed.

The writ of certiorari also should be granted because of the conflict between the decision of the Court of Appeals for the Seventh Circuit, in the case at bar, and the decision of the Court of Appeals for the Ninth Circuit in *Paritem Singh Poonian v. United States*, 294 F. 2d 74. The question involved in this conflict between the decisions of the two Courts of Appeals is whether there is a substantial variance between the indictment and the proof. In the case at bar, the petitioner, Margaret S. Cain, and her husband were charged with wilfully attempting to evade and defeat "their" income taxes due upon "their" income, when, as a matter of fact and proof, she had no income and there was no proof of her tax liability.

In *Poonian v. United States*, 294 F. 2d 74, 75, the reversal was based upon a charge that the defendant falsified "his" income whereas, in fact and proof, the income was that of his brother. The *Poonian* conviction was reversed by the Court of Appeals for the Ninth Circuit while in the case at bar, Mrs. Cain's conviction was affirmed.

It is further submitted that the decision of the Court of Appeals below, in this case, is at variance with and in conflict with a decision of this Court, *Stirone v. United*

States, 316 U.S. 212. The proof below showed income and tax deficiency on the part of Allan C. Cain alone, and no income or tax deficiency on the part of Margaret S. Cain. Such evidence belied and was in conflict with and different from the charge brought by the grand jury. The Court of Appeals below ignored the charge of variance and stated that "The offense charged was wilfully attempting, 'in any manner to evade or defeat', *the tax* herein." (Emphasis supplied) This rationalization ignores the petitioner Margaret S. Cain's complaint that her conviction was not based on proof of attempted evasion of "their" income tax on "their" income, as charged in the indictment.

The decision for which review is sought is in conflict with the spirit and letter of a decision of this Court, *Holland* v. *United States*, 348 U.S. 121, 139, where the Supreme Court approved the following statement concerning the crime charged in this case,

> "Wilfulness involves a specific intent which must be proved by independent evidence and which cannot be inferred from the mere understatement of income."

It is further submitted that the judgments of conviction and the sentences to penitentiary imprisonment of a lawyer pronounced incompetent to commit the offense by reason of organic brain disease and additional psychogenic impacts, and his wife involved by her signature upon a joint income tax return although she had no income, or tax liability, or duty to file a return, present various substantial problems important to the administration of criminal justice in the Federal Courts, and, thus, the record deserves review by this Court.

Courts of Appeals for two Circuits clearly have adopted or prescribed new rules governing the insanity defense differing from the M'Naghten Rules as described in *Davis*

v. *United States*, 160 U.S. 469. These Circuits are the District of Columbia and the Third Circuit. The Fourth Circuit has indicated its tolerance for a change from the M'Naghten Rules in a proper case. The Eighth Circuit has adhered to the *Davis* case but has expressed its opinion that the matter should be reviewed by the Supreme Court. The Ninth Circuit has summarized the confusion and division of opinion in the Circuits and has stated that "This is an ideal situation in which to attempt to obtain a definitive on this point."

Many of the State legislatures, including Wisconsin, Indiana, and recently, Illinois, have adopted standards at variance with the M'Naghten Rules. The American Law Institute has proposed its version of an appropriate standard for criminal responsibility as part of the Model Penal Code. Many writers of note have devoted themselves to this subject and the conflicting issues in recent years. An excellent example of such research and discussion is contained in the University of Chicago Law Review, Volume 22, Page 317 (Winter 1955, No. 2).

The presence of a divergence of views and applicable law in the various Circuits under the Court of Appeals' decision cannot be questioned. The Court of Appeals, for the Seventh Circuit, in the case at bar, purports to express its approval of two rules which it holds are "substantially" the same. These rules are:

> "The trial court's test was:
> "If a person can distinguish between right and wrong, or if he is aware of what he is doing and has the mental capacity to choose between a right and a wrong course of action, it is my view that the law requires that he be held responsible for his acts."

and,

"Ill. Crim. Code 1961 ch. 38 §6-2, Insanity. (a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

It is submitted that the test described by the Court of Appeals as being that of the trial Court is not complete and is not, on analysis, in accordance with the Illinois Criminal Code, the Model Penal Code, the M'Naghten Rules, the Durham test, or the Third Circuit test. All of these rules or tests include the element of the ability of the subject to control his conduct, to conform his conduct to requirement of law, or indicate that a causal relation between mental disease and defect and the crime render the subject not responsible.

Mere ability to "distinguish" or to be "aware" or to "choose", is not sufficient in the presence of irresistible impulse, inability to conform to law, or a causation resulting from mental defect or disease.

The difference between the described test of the trial Court in the case at bar and the Illinois Criminal Code, set forth above, is apparent.

In *Durham* v. *United States*, 214 F. 2d 862, decided in 1954, the Court of Appeals for the District of Columbia stated that it was adopting a rule "not unlike that followed by the New Hampshire Circuit since 1870", referring to *State* v. *Pike*, 1870, 49 N.H. 399. The *Durham* rule was then stated, page 874: "It is simply that an accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect."

Two opinions of the Court of Appeals of the District of Columbia have extensively explained the *Durham* rule. These are *Douglas* v. *United States*, 239 F. 2d 52, 58 (1956),

and *Carter* v. *United States*, 252 F. 2d 608, 617 (1957). As recently as March 29, 1962, in *Campbell* v. *United States*, No. 16,414 C.A.D.C. Circuit Judge Washington, speaking for himself and Judge Bazelon, reaffirmed that Court's decision to the *Durham* decision and the explanations in the *Douglas* and *Carter* decisions. Circuit Judge Burger dissenting in the recent *Campbell* case did not agree on the majority's construction of the "product test". In his conclusion he stated, at page 29 of the slip opinion:

> "Perhaps we have paved our route with the best of intentions, but in the actual application of our standard we have departed from the basic postulate that in a criminal case the inquiry into mental capacity is only to determine whether the defendant possessed the capacity, power, ability—whatever we call it—to form the indispensable criminal or 'evil intent.' This cerebral, mental, or intellectual element is the critical factor without which the overt physical act, even though unlawful, is not a crime."

The Third Circuit found the Durham rule unsatisfactory as an improvement on M'Naghten Rules and adopted a third rule in *United States* v. *Currens*, 290 F. 2d 751, (1961). Chief Judge Biggs wrote:

> "We come now to another question which must be decided before we can reach the issue of what rule of criminal responsibility should be imposed in respect to Currens: whether that of M'Naghten or Durham or some other." (P. 761):

> "The court below, relying on the decision of the Supreme Court of the United States in *Davis* v. *United States*, *supra*, its first Davis decision in 1895, on the second Davis decision, *Davis* v. *United States*, 1897, 165 U.S. 373, 378, 17 S.Ct. 360, 41 L.Ed. 750 and apparently on *Matheson* v. *United States*, 1913, 227 U.S. 540, 33 S.Ct. 355, 57 L.Ed. 631, charged the jury as to Currens' criminal responsibility in terms of the

M'Naghten Rules but added glosses of temporary insanity and irresistible impulse. The backbone of the charge given by the court below was the knowledge of right and wrong by the accused, the so-called 'right-and-wrong' test of M'Naghten.

"We think that there are cogent reasons why the M'Naghten Rules should not be followed or applied today in the courts of the United States." P. 763;

"The M'Naghten Rules are unworkable for a number of reasons.

"Further the M'Naghten Rules are a sham, as Mr. Justice Frankfurter made plain in his testimony before the Royal Commission on Capital Punishment." P. 765;

"Mr. Justice Douglas also has indicated his disapproval of the M'Naghten Rules in his article The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists, 41 Iowa L.Rev. 485 (1956)." P. 766;

"In *Sauer* v. *United States*, 241 F. 2d 640, certiorari denied, 1957, 354 U.S. 940, 77 S.Ct. 1405, 1 L.Ed. 2d 1539, Judge Barnes, speaking for the Court of Appeals for the Ninth Circuit, discusses the advantages and disadvantages of the M'Naghten Rules and the Durham formula and states that it is for the Supreme Court or for Congress to make any drastic revision in respect to the rule of criminal responsibility in this field. But the M'Naghten Rules are not based on any Act of Congress." P. 769;

"One hundred and eighteen years have elapsed since the M'Naghten Rules were laid down by the judges of England. Over sixty years have gone by since the second Davis decision was written and nearly fifty years have passed since the *Matheson* case was decided." P. 770;

"The Durham formula obviously does not meet these requirements." P. 773;

and

[12] "We are of the opinion that the following formula most nearly fulfills the objectives just discussed: The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." P. 774.

Thus two different rules have been adopted by the Court of Appeals for the District of Columbia and the Court for the Third Circuit. The Seventh Circuit has adopted or approved another rule in the case at bar. All differ from the M'Naghten Rules.

The Fourth Circuit Court of Appeals has indicated its readiness to vary from M'Naghten Rules through Chief Judge Sobeloff's opinion in *Rhodes* v. *United States*, 282 F. 2d 59.

The Eighth Circuit adheres to the M'Naghten Rules, but has proposed still another test providing for three positive findings of the presence of necessary elements of a defendant's cognition, volition and capacity to control his behavior, to overcome the defense of insanity. This test is proposed in *Dusky* v. *United States*, 295 F. 2d 743, and is the second opinion in that case, the first being reported at 271 F. 2d 385, which was reversed at 362 U.S. 402, 4 L. Ed. 824, 80 S. Ct. 788.

The Ninth Circuit in *Sauer* v. *United States*, 241 F. 2d 640 after review of criminal responsibility where the issue is insanity said at page 652.

"VI. *Conclusion.*

"Counsel has urged upon us that two members of the Supreme Court are apparently ready to adopt the Durham rule or some equivalent thereof. A division of opinion exists in the Circuits. It would seem therefore that this is an ideal situation in which to attempt to obtain a definitive on this point.

"(7) But it is not for this court to undertake a drastic revision in the concept of criminal responsibility, a task which would necessitate a searching analysis of philosophies, purposes, and policies of the criminal law, and which might substitute freedom of insane persons for either confinement or commitment. If change there is to be, it must come from a higher judicial authority, or from the Congress."

In the case at bar, the Courts below have omitted from tests applied, the element of ability to control behavior; or to conform to requirement of law.

II.

There was no evidence on the part of the government to meet the defendants' medical and psychiatric evidence on the petitioner Cain's inability to make the judgment necessary to form intent to commit the charged violations, or to conform to law. In this respect the Seventh Circuit Court of Appeals has departed from its former decision in *United States* v. *Westerhausen*, 283 F. 2d 844. The record in the case at bar does not justify the holding that there was proof of sanity beyond a reasonable doubt. The prosecution's evidence did not meet the evidence of the petitioner with regard for his ability to control or conform his conduct. The decisions below were based solely on ability to determine right from wrong, to be aware of his act, or to choose between right and wrong. Ability to control or conform conduct and evidence thereupon was ignored or presumed met by determination of the right and wrong test, by knowledge, awareness or choice. Thus a most important element, expressed differently in most tests, but always present as an element, was ignored.

The government failed to present any scientific evidence on the issue, and this left the petitioner's doctors uncontradicted on this part of the issue.

III.

The substantial variance between the proof in the case and the indictment has deprived Mrs. Cain of a just trial. It is urged that all of the evidence was admitted and considered without regard for which petitioner it was applicable because they were husband and wife.

However, guilt must be individual, whoever the defendants are, or how many. It must be proved with regard to Constitutional safeguards or denial of due process and fair trial results.

Mrs. Cain was characterized by the prosecutor in the Court of Appeals as *liable* to prosecution. It is urged that this will not justify conviction on a charge not proved or on proof not charged.

The variance was substantial and the conflict between the Seventh Circuit in the case at bar, and the Ninth Circuit in *Poonian* v. *United States*, 294 F. 2d 74, should cause this Court to grant certiorari and review these convictions. The decision below was contrary to the decision of this Court in *Stirone* v. *United States*, 316 U.S. 212, where a variance caused grant of certiorari and reversal.

It is submitted that the trial Court in effect, erred in its self instruction on the law in this case; and convicted and sentenced the husband and wife under misconception of law, as in *Wilson* v. *United States*, 250 F. 2d 312, 324.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted.

MAURICE J. WALSH,
Counsel for Petitioners.

In the

United States Court of Appeals

For the Seventh Circuit

No. 13347 SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ALLAN C. CAIN and MARGARET S. CAIN, *Defendants-Appellants*.	Appeal from the United States District Court for the Eastern District of Wisconsin.

January 25, 1962.

Before SCHNACKENBERG, KILEY and MAJOR, *Circuit Judges*.

KILEY, *Circuit Judge*. The defendants, husband and wife, appeal from judgments, in a trial without a jury, convicting them of attempted evasion of income taxes; and sentencing each to prison for one year on each of four counts, the sentences to run concurrently, and imposing on each a fine of $2,000.00.

Allan Cain is a Wisconsin lawyer. He and Margaret S. Cain were married in 1934 and she has, since that time, been his full time secretary. In 1957 Government agents began an investigation of a $750.00 deduction in the Cain 1955 joint tax return. At a conference with the Cains the agents were told by Cain that he had underestimated in

come for several years and had $20,000.00 for payment of any deficiencies. The agents with help from the Cains eventually corrected the gross income, net taxable income and tax liability for the years 1953 through 1956. The total deficiency was $19,946.10, which the Cains paid the Government January 15, 1960.

The indictment was returned January 18, 1960. In Count One it charges both defendants with attempted income tax evasion in 1953 under §145(b)[1] of the Internal Revenue Code of 1939; and in the other three counts charges evasion in the years 1954, 1955 and 1956 under §7201[2] of the Internal Revenue Code of 1954.

At the trial the issues were whether Allan Cain was mentally competent to form the intent essentia o guilt under §7201; and if so whether he and his wife were wilful, or merely grossly negligent, in failing to report their income taxes properly in the years involved.

The trial court found Cain was "sane and mentally competent" to commit the offenses. Defendants contend that this finding is erroneous because the court applied the wrong test of mental competency and failed to give adequate consideration to defendants' expert testimony.

[1] Int. Rev. Code of 1939 ch. 289 §145(b), 52 Stat. 513.

Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall * * * be guilty of a felony * * *

[2] Int. Rev. Code of 1954 §7201

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony * * *

The trial court's test was:

> If a person can distinguish between right and wrong, or if he is aware of what he is doing and has the mental capacity to choose between a right and a wrong course of action, it is my view that the law requires that he be held responsible for his acts.

We think this test is substantially that provided in the new Illinois Code,[3] which defendants suggest is a "significant advance" and the proper test.

We find no error in the test[4] and agree with the trial court that the criminal law recognizes no gradation of responsibility for crime. "For the purposes of conviction there is no twilight zone between abnormality and insanity." *Holloway* v. *United States*, D. C. Cir., 148 F.2d 665, 667 (1945). Only when guilt is settled may considerations of mercy make degrees of mental illness relevant.

The evidence on the issue of wilfulness was given by experts for Cain and, for the Government, by two Wisconsin judges and several lawyers. We cannot make any inference favorable to Cain from the failure of the Government to match expert with expert. The Government was not required to present expert testimony. It had the burden of proving Cain's wilfulness beyond a reasonable doubt; its *prima facie* case of Cain's capacity for wilfulness rested on the presumption of sanity; Cain's expert testimony was offered to overcome the presumption

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[3] Ill. Crim. Code 1961 ch. 38 §6-2. Insanity. (a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

[4] The parties agree that we need not discuss the various tests courts have used in deciding insanity issues.

and create a reasonable doubt; and the Government's witnesses from bench and bar were offered to remove any reasonable doubt raised by the defense. *United States* v. *Westerhausen*, 7 Cir., 283 F.2d 844, 852 (1960); *Holloway* v. *United States*, D.C. Cir., 148 F.2d 665, 666 (1945). This order of proof was followed and the selection of the quality and quantity of proof was a matter for the Government to decide.

Defense testimony on the mental incompetency issue was substantially this: Allan Cain during 1953 through 1956 was not competent to form a criminal intent in filing income tax returns. He had then an organic brain disease complicated by emotional stress due to family tragedy and fear that he was doomed by cancer. He suffered from "confusion, grief, worry and fear" and was incapable of dealing with severe emotional and psychological stresses. He knew the difference between right and wrong in some areas but not in others, and was incompetent in matters of "judgment, finely integrated thought patterns and memory, concentration . . . ." It was doubtful whether he could determine right from wrong in income tax matters. He might be conscious of wrongdoing but have no choice. He could perform only the mechanical parts of law practice and his ability to handle defense of a murder case was doubtful.

Also: There are many gradations of emotional and mental abnormalities. The inability to go beyond mechanical parts of law practice was a "gradation problem." Generally, incapacity to determine right from wrong in income tax matters would be observable by others.

The Government testimony, of the judges and lawyers, was to the effect that Cain handled himself very well between the years 1954 and 1960, showed "sharp judgment and thought" in cross-examination, was "very definite"

capable of computing special damages in injury cases; "courtroom pressure" did not affect him; and was capable of handling himself in any situation. There was testimony that he defended murder and other criminal cases.

The judge's conclusion was that the expert testimony tended to prove organic impairment and neurotic personality but was not persuasive as to the question of capacity for the essential wilfulness. The court was not persuaded by the experts that Cain could be mentally incompetent only with respect to the tax matters. Cain's demeanor on the witness stand went toward "dispelling any doubt" the court had of his competency.

We see no merit in the contention that the court was hostile to the expert testimony and that he failed to give it due weight. A jury would not be bound to accept the expert opinion, *Holloway* v. *United States*, D.C. Cir., 148 F.2d 665, 667 (1945), and it follows that the trial court here, as trier of fact, was not bound, by the opinions, to find that Cain was incompetent to "wilfully prepare and file" false income tax returns for the years subject of indictment.

We cannot say the court's finding of mental competency was clearly erroneous. The testimony for defendant is not "substantial" in the way the testimony was in the *Westerhausen* case. Nor does the finding of the trial court here "shock the conscience," *Holloway* v. *United States*, D.C. Cir., 148 F.2d 665, 666 (1945), or impel us to say as the court said in *Westerhausen*: "reasonable men must necessarily have possessed a reasonable doubt" as to Cain's sanity in the years 1952 through 1956.

Defendants argue there were none of the badges of fraud recited in *Spies* v. *United States*, 317 U.S. 492 (1943). There was evidence, however, from which the

trial court could reasonably infer that Cain's voluntary admission to the agents in 1957 was artful; that defendant failed to keep books during the years involved; deliberately estimated in the reports odd amounts of dollars and cents; deliberately omitted large fees in calculating income; and that the returns, subject of the indictment, were less than 30% correct. The findings of relevant factors have substantial support in the evidence. Upon these reasonable inferences, the court found defendants guilty beyond a reasonable doubt. We cannot say that "reasonable men must necessarily have possessed a reasonable doubt," *United States* v. *Westerhausen*, 7 Cir., 283 F.2d 844, 853 (1960), of defendants' attempt to wilfully evade income tax as charged in the indictment.

When married, Mrs. Cain had already been a secretary, had graduated from high school and had studied bookkeeping. She filled out about thirty or thirty-five income tax returns each year for wage earners and farmers during the years in question. She knew the technical income tax words and computed depreciation for the farmers. She took a long term capital gain on sale of the Cain house in 1952 and knew that profit from the sale of a house was not taxable if reinvested in a new residence. We think the trial court properly concluded she was not a "housewife" who was ignorant of tax affairs.

Defendants finally contend Mrs. Cain was denied a fair trial. We have not been shown that the trial court considered as to Mrs. Cain evidence not properly admitted as to her. We presume, therefore, that the court considered only the proper evidence against her. That evidence justified the court's finding of guilt. It was not necessary that she have any of the income in the years involved. The offense charged was wilfully attempting "in any

manner to evade or defeat" the tax. Mrs. Cain was guilty if she "contributed consciously to furthering that illicit enterprise • • •." *United States v. Johnson*, 319 U.S. 503, 515.

For the reasons given, the judgment is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Thursday, January 25, 1962

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. J. EARL MAJOR, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. ALLAN C. CAIN and MARGARET S. CAIN, *Defendants-Appellants.*	Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 13347

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

March 12, 1962

Before

Hon. Elmer J. Schnackenberg, *Circuit Judge*
Hon. Roger J. Kiley, *Circuit Judge*
Hon. J. Earl Major, *Circuit Judge*

United States of America, *Plaintiff-Appellee,* vs. Allan C. Cain and Margaret S. Cain, *Defendants-Appellants.*	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 13347	

It is hereby ordered that the opinion of this court in the above cause, heretofore filed on January 25, 1962, be amended in the following respects:

(a) The last sentence on page 2 of the opinion is eliminated, and the following two sentences are substituted in its stead:

> The first alternative of the "test" is incomplete. We think, however, the second alternative, which alone the trial court applied in deciding Cain's capability for wilfulness, is substantially that provided in the Illinois Code, which defendants suggest is a "significant advance" and the proper test.

and (b) In the first line of page 3 of the opinion, the word "applied" is inserted after the word "test".

CORRECTED COPY

In the

United States Court of Appeals

For the Seventh Circuit

No. 13347 SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALLAN C. CAIN and
MARGARET S. CAIN,
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began an investigation of a $750.00 deduction in the Cain 1955 joint tax return. At a conference with the Cains the agents were told by Cain that he had underestimated income for several years and had $20,000.00 for payment of any deficiencies. The agents with help from the Cains eventually corrected the gross income, net taxable income and tax liability for the years 1953 through 1956. The total deficiency was $19,946.10, which the Cains paid the Government January 15, 1960.

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that this finding is erroneous because the court applied the wrong test of mental competency and failed to give adequate consideration to defendants' expert testimony.

The trial court's test was:

> If a person can distinguish between right and wrong, or if he is aware of what he is doing and has the mental capacity to choose between a right and a wrong course of action, it is my view that the law requires that he be held responsible for his acts.

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sidered as to Mrs. Cain evidence not properly admitted as to her. We presume, therefore, that the court considered only the proper evidence against her. That evidence justified the court's finding of guilt. It was not necessary that she have any of the income in the years involved. The offense charged was wilfully attempting "in any manner to evade or defeat" the tax. Mrs. Cain was guilty if she "contributed consciously to furthering that illicit enterprise • • •." *United States* v. *Johnson*, 319 U.S. 503, 515.

For the reasons given, the judgment is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Monday, March 12, 1962

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. J. EARL MAJOR, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee.*	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 13347 vs.	
ALLAN C. CAIN and MARGARET S. CAIN, *Defendants-Appellants.*	

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of the Opinion, filed January 25, 1962; Judgment, entered January 25, 1962; Order Amending Opinion, entered March 12, 1962; Corrected Copy of Opinion filed January 25, 1962,; Order Denying Petition For Rehearing, entered March 12, 1962 in:

Cause No. 13347

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

vs.

ALLAN C. CAIN and MARGARET S. CAIN,

Defendants-Appellants.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixteenth day of March A. D. 1962.

KENNETH J. CARRICK

Clerk of the United States Court of Appeals
For the Seventh Circuit.

(Seal)